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November 9, 2000

NOTICE OF EX PARTE PRESENTATION

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 - 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Wireless Consumers Alliance, Inc.
Petition for Declaratory Ruling
Docket No. WT 99-263

Dear Ms. Salas:

Transmitted electronically herewith for filing is a memorandum describing the *ex parte* meeting on November 8, 2000, between a representative of the Wireless Consumers Alliance, Inc. and staff members of the Wireless Telecommunications Bureau.

Very truly yours,

s/ Kenneth E. Hardman
Kenneth E. Hardman

Enclosure

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EX PARTE MEMORANDUM

M E M O R A N D U M

To: Ms. Magalie Roman Salas, Secretary
Federal Communications Commission

From: Kenneth E. Hardman

Date: November 9, 2000

Re: Petition of the Wireless Consumers Alliance, Inc.
Docket No. WT 99-263

Kenneth E. Hardman, representing the Wireless Consumers Alliance, Inc., met on November 8, 2000, with James D. Schlichting, Blaise A. Scinto and Mary Woytek of the Wireless Telecommunications Bureau concerning the BellSouth petition for review of the Commission's decision and CTIA's petition for reconsideration thereof. Following is a summary of the arguments advanced in the meeting on behalf of WCA:

1. This proceeding is an adjudication of narrow and specific issues, in contrast to a broad, quasi-legislative rulemaking; and the Commission's decision was rendered after a full briefing by all sides and after a deliberate and thorough consideration of the issues. Therefore, the Commission should not routinely request the Court of Appeals to defer consideration of BellSouth's appeal pending disposition of CTIA's petition for reconsideration. Such a request by the Commission could be mischievously twisted by the cellular industry to suggest in the various court proceedings that the Commission is now uncertain about the declaratory ruling it issued, and therefore that the ruling should be afforded little consideration. In fact, AB Cellular Holding (a BellSouth affiliate and one of the parties in the California litigation) has already told the California Court of Appeals that "the Court should not afford undue weight to the FCC's decision in *Wireless Consumers Alliance*".

2. Moreover, the CTIA petition is appropriate for summary disposition because it does not come close to stating grounds for reconsideration by the Commission. In turn, the briefing schedule is

not established by the Court of Appeals until a few months after an appeal is filed, i.e., the briefing schedule is deferred until the appeal is scheduled for oral argument. Therefore, there is ample time to dispose of CTIA's petition prior to the commencement of briefing, even without seeking a deferral of the appeal. Conversely, any delay in the appeal for the purpose of disposing of CTIA's petition would correspondingly delay the oral argument and the Court's ultimate decision in the case; and even a short delay would be inimical and counterproductive to the underlying purpose of the Commission in issuing its decision to remove present uncertainty in civil litigation around the country.

3. The ostensible basis for reconsidering the Commission's decision is CTIA's assertion that the decision "is flawed because it fails to resolve an existing controversy or remove uncertainty regarding the preemptive scope of Section 332(c)(3)" (Petition at p. 2), and because "the Commission's analysis should focus not on the question of 'damages,' but rather on the specific relevant statutory language, *i.e.*, the meaning of 'regulate' the 'rates charge by'." (Petition at p. 3). Whether the decision in fact succeeds in removing uncertainty or resolving a controversy (the standard for issuing a declaratory ruling in the first place) obviously is a matter of opinion. That CTIA continues its long-standing and fully explicated disagreement as to the appropriateness of the declaratory ruling, as well as the substance of it, simply reflects its continuing difference of opinion. Further, it is clearly incorrect for CTIA to claim that the Commission's decision did not adequately interpret the statutory language "regulate the rates" in Section 332(c)(3). The Commission's discussion in ¶¶13-22 is abundantly clear that "regulate the rates" means traditional utility rate regulation by the states, and the decision goes on in ¶¶23-36 to specifically reject the cellular industry's attempts in the record herein – and regurgitated in CTIA's petition – to twist that statutory language into immunity from damages in civil litigation.

4. In short, CTIA's petition simply repeats once again the cellular industry's contentions that were fully considered and correctly rejected in the Commission's decision. CTIA's continued disagreement with the Commission's decision is unsurprising, but is plainly not a basis for reconsidering the carefully considered and meticulously documented order in this case. Accordingly, CTIA's petition for reconsideration should be summarily denied.